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PROXIMATE CONSEQUENCES IN THE LAW
OF TORTS

THE question of the proximateness of consequences arises in two classes of cases: first, where a person is to be held responsible for the consequences of some cause other than his own breach of duty, as in insurance, and secondly, where the cause is a breach of duty by him. The rules that prevail in the two classes of cases are very different. A consequence may be proximate for one purpose and remote for another. In the second class of cases the breach of duty may be a breach of contract or of some non-contractual obligation, or it may be a tort. There is a conflict of opinion as to whether the rules about proximateness are the same in cases of tort and of breach of contract. Without attempting to decide that question, the present discussion will be confined to cases of tort. The word "wrong" in this article will be used only of torts.

The question of proximateness may arise in relation to any one of various elements in a tort. Those elements are as follows.

First, there must be a breach of duty. A breach of duty is by an act or omission. For brevity's sake in the following discussion the word "act" will generally be used. What is said of acts may be applied *mutatis mutandis* to omissions. A duty is to do or not to do some act. The act to be done or omitted forms the content of the duty. The word "act" is here used in Austin's sense to denote a mere bodily movement, excluding its consequences. This is an act *stricto sensu*. An act *latiori sensu* includes certain of the near consequences of the bodily movement, which are called direct consequences. In a trespass the consequences must be direct, *i. e.*, must be included in the "act"; therefore in some cases, *e. g.*, negligently running over a person, where either trespass or case will lie, it is often said that trespass lies for the act itself and case for the consequences.

But an act *stricto sensu* in and by itself is never commanded or forbidden by law. What the law commands or forbids is always the production of certain consequences, which may be called the defini-

tional consequences of the act. For instance, a battery may be committed by a hundred different acts; the definitional consequence, which the law forbids, is the contact between the body of the injured person and the instrument with which the battery is committed. If I strike in the air with a stick or throw a stone when no one is near, I do precisely the same act as though some person stood where he would be hit; but since the act does not produce any injurious consequences, it is not a breach of duty. A duty, therefore, is not merely to do or abstain from an act, but to act or not to act so as to produce some definitional consequence specified by the law. The definitional consequences of acts are, therefore, also definitional consequences of duties.

Those consequences may be actual, probable, or intended. Therefore there are three classes of duties. (1) Duties of actuality, which are defined by reference to the actual consequences of the act. A person must or must not act so as actually to produce certain consequences. The duty is not broken unless the consequence is actually produced. Duties not to commit trespasses are of this sort. So is the duty of the possessor of a dangerous animal to prevent it from doing harm. He must do such acts as will actually prevent the harm; it is not enough that he uses due care to prevent it. (2) Duties of probability, defined by reference to the probable consequences of the act. The duty is to act or not to act in a way that will probably produce a certain consequence. The duty may be broken though the consequence never in fact happens, though in that case there will be no wrong because no right has been violated. This is the most numerous class of duties. Duties to use due care are of this kind. Negligence is conduct which will probably produce damage. Therefore, these duties may also be called duties of care or of due care. (3) Duties of intention, defined by reference to the intended consequences of the act. The duty is not to act with an intention to produce a certain consequence. Fraud and malice include such an intention; so that duties of intention may be subdivided into duties of mere intention, of fraud, and of malice. Here, too, there may be a breach of duty, though the intended consequence is not produced. It is a breach of duty to make a fraudulent misrepresentation, even though it is not believed or acted on, so that no harm results; though in that case there is no tort. A duty of actuality may also

belong to one of the other classes. There may be a duty not actually to produce a consequence intentionally or negligently. Duties not to commit trespasses are duties of actuality, but there is much conflict of opinion as to whether intention or negligence is necessary to a trespass. A duty of actuality, where intention or negligence is not necessary, a pure duty of actuality, may be distinguished as a peremptory duty. It must be carefully borne in mind that a breach of duty by itself is not a tort; it is only one element in a tort. There may be an undoubted breach of duty, and yet no tort.

The second element in a tort is a violation of right. The word "right" has various different meanings: there are various different kinds of rights; some of which kinds are incapable of being violated. The kind of rights here under consideration have for their contents not acts, as is the case with some of the other kinds of rights, but certain conditions of fact, whose existence and integrity the law seeks to protect for their holders. Any impairment of the protected state of fact is a violation of the right. The word violation, it should be noticed, is here used in a sense a little different perhaps from its ordinary one. It covers impairments of the protected state of fact which are not due to any one's wrongdoing. Therefore a violation of right, like a breach of duty, is not of itself a tort, but is only one element in a tort. If a person injures my body by mere accident, my right of bodily security is violated, in the sense in which I am here using that word, just as much as if he had done so on purpose; but there is no tort.

So far as the law of torts is concerned (the law of contracts and obligations is wider), the states of fact which the law protects for a person and the rights related thereto are usually the following, though there are a few kinds of wrongs generally, though perhaps improperly, classed as torts where the impairment of other states of fact constitutes the violation of right. (1) The person's own condition, which is covered by the right of personal security, which may be divided into the sub-rights of life, bodily security, liberty, reputation, mental security (to a limited extent), and perhaps privacy. (2) The condition of certain other persons connected with him, *e. g.*, his wife, child or servant, and services due him from them. Rights in those may for convenience be called potestative rights. (3) The possession and physical condition of corporeal things, which are the contents of normal property rights. (4) Cer-

tain conditions of fact which are usually described as relating to incorporeal things, which form the contents of what may be called abnormal property rights, *e. g.*, franchises, patent rights, rights in trademarks. (5) A person's pecuniary condition, the total value of his belongings. For these last I posit a separate right, which may be called the right of pecuniary condition. It is violated by depriving the person of any value which he already has (*damnum emergens*), and in some cases by preventing him from acquiring a gain which he would have acquired (*lucrum cessans*). The violation of any other right, and also the depriving a person of a right, which is a different thing from the violation of a right, or imposing a duty or liability upon a person, imports pecuniary loss and therefore a violation of this right. This right of pecuniary condition has not generally been recognized in our law as a separate right. It is usually considered as embraced in the right of property. Sometimes the expression "property which a person has a special right to acquire" is used. It is, however, important to distinguish between the two rights, especially because the duties which correspond to them are very different. The right of property relates to the possession and physical condition of specific things; the right of pecuniary condition to value. If a thing is injured and its value is thereby depreciated, both rights are violated. But the physical condition of a thing may be changed, and thereby the right of property in it violated, without any depreciation of its value, even with an increase in its value, as where a person embroiders upon another's piece of silk or builds a house on another's land, both of which may be torts.

Thirdly, it is not enough to make a wrong that there should be a breach of duty and a violation of right, though both of those elements are essential. The duty and the right must correspond to each other. There is no general rule as to what duties correspond to what rights. Some duties correspond to many rights, some to but few; some rights have many duties corresponding to them, some few. Speaking generally, duties of actuality and probability usually correspond only to rights of personal security (with some exceptions), potestative rights (with some exceptions), and normal property rights; duties of mere intention, to rights of personal security, potestative rights, and both normal and abnormal property rights; while duties of malice and fraud correspond to

those rights and also to the right of pecuniary condition. But that statement is only approximately correct. For example, a life insurance company cannot have an action against a person who negligently kills one of its policy-holders; but it can, if the killing is done with a malicious intent to cause a loss to the company. The company has no potestative right in the life of the insured; the only right of its which is violated is the right of pecuniary condition. In case of a negligent killing, the only duty broken is a duty of due care, of probability, which does not correspond to the right of pecuniary condition; but if the killing is malicious, a duty of malice is broken, which does correspond to that right. So in a state where a mortgage is considered to be a mere hypothecation, not giving the mortgagee any property right in the land, it has been held that the mortgagee cannot have an action against a third person for a merely negligent, or even an intentional, injury to the land, even though his security is thereby impaired; but he can for an injury done with a malicious intent to injure his security.¹

Fourthly, to make a wrong the breach of duty must be the actual cause and, fifthly, the proximate cause of the violation of right. It can be the actual cause without being the proximate cause.

All the above mentioned five elements are absolutely essential to a wrong; if any one of them is wanting, there is no wrong. Any damage that may have followed the act is *damnum absque injuria*. There is a complete actionable wrong as soon as all those five elements are present, though there may be no actual damage. But after the wrong is complete as a wrong, it may give rise to further injurious consequences for which a recovery can be had in an action for the wrong. Those consequences will be called in this article consequential damage. In its ordinary legal use the expression consequential damage may include the very violation of rights that is an element in the wrong, if that is only an indirect consequence of the act. But as here used it denotes damage that is not included in the wrong itself, but is additional to and consequent upon it. Consequential damage need not be a violation of any right to which the duty broken corresponded, *e. g.*, in an action for a merely negligent injury to a person or to property a resulting pecuniary loss may sometimes be recovered for as consequential damage.

¹ Van Pelt *v.* McGraw, 4 N. Y. 110 (1850). But some courts allow the mortgagee an action, considering that he has a protected right in the land.

The question of the proximate consequences must be distinguished from several other questions that have often been confounded with it. The reason why contributory negligence will defeat an action has often been said to be that the plaintiff's negligence makes the injury only a remote consequence of the defendant's negligence. If that is the correct view of the matter, then that particular case of remoteness is *sui generis* depending upon its own principles, and has no bearing on the general nature of proximate consequences.

The question of the proximate consequences of a given consequence cannot arise, or at least can have no practical importance, until it has first been made to appear that all the other elements of a tort are present. Courts have sometimes decided against a plaintiff on the ground that the damage to him was not the proximate consequence of the defendant's act, when the actual case was that some other element of a tort was lacking. Such decisions cannot be relied on as authorities on the question of proximate consequences. Sometimes the defendant's act was not a breach of duty at all. This kind of confusion is especially likely to arise when the defendant's duty was a duty to use care. Such a duty, as has been explained, is a duty to act with reference to the consequences that may probably follow the act; and, as will presently be explained, probability means a reasonable probability, consequences which are not reasonably probable may be disregarded by the actor, even though they can be foreseen as possible. If a duty of this sort exists not to expose another to damage, the danger must be an unreasonably great one. Now, as will hereafter appear, proximate consequences also sometimes depends upon probability. Therefore it is possible to confound the two probabilities, and in a case where the probability of harm was not sufficient to create any duty in respect to it, to say that the harm, if it has actually happened, was not a proximate consequence of the act. For example, a passenger was rightfully put off from a railroad train for misbehavior. He was drunk, but not so drunk as to be helpless. Shortly afterwards he was run over by another train. The railroad company was held not liable. The court said that even if after being put off he was in some danger, there was no unusual danger, no more than to any one who might be in the vicinity of the track, and that the injury to him was not the proximate consequence of the conductor's act in ex-

elling him.² This plainly means that it was not negligent, *i. e.*, not unreasonably dangerous, to put him off as was done, and therefore the conductor, having an unquestioned right to put him off in a proper manner, had been guilty of no breach of duty. The question whether the injury to him was a proximate consequence of the conductor's act did not properly arise at all. Even if it had been proximate, the company would not have been liable. So damage has been said to be remote, because the court thought that no right of the plaintiff had been violated.³ The same has been said when the real case was that it did not sufficiently appear that the conduct complained of was actually the cause of the consequence at all, or even that any such consequence had actually happened or, where a claim has been made for future or prospective damage, that it really would happen. Of course, if a certain consequence is not the consequence of a certain alleged cause at all, it is not a proximate consequence of it. But the questions of actual cause, which is always one of pure fact, and of proximate cause, which may be a question of law, are quite distinct. It must appear that the cause has actually produced the consequence, or will actually produce it, before the question of the proximate-ness of that consequence can be raised at all. This covers many cases where damage has been held remote because it was too uncertain or speculative, but not all such cases.

When the duty broken did not correspond to the right violated, this has often been expressed by saying that the damage was remote. This is the reason usually given for holding that a life insurance company cannot recover against a person who negligently kills one of its policy-holders. As has been explained, the true reason is want of correspondence between the duty and the right. Such damage in fact might be proximate, if the test of proximate-ness were probability, as in such a case many courts would hold it to be. If the actor knew that the life of the person who was endangered by his negligent act was insured, a loss to the insurance company might be a probable, and therefore a proximate, consequence of the act. In *Anthony v. Slaid*,⁴ the plaintiff had contracted with a town to support certain paupers and supply them with neces-

² *Railways Co. v. Valleley*, 32 Oh. St. 345 (1877).

³ *Lamb v. Stone*, 11 Pick. (Mass.) 526 (1831).

⁴ 11 Metc. (Mass.) 290 (1846).

saries for a fixed sum. The defendant committed a battery upon one of the paupers and injured him, whereby the plaintiff was put to expense for his care. It was held that the plaintiff had no cause of action against the defendant. The court said that the damage to the plaintiff was remote. It may really have been remote, but would have been probable had the defendant known of the contract. Really the case was one of want of correspondence between the duty and the right. The plaintiff had no potestative right in the pauper, and the only right of his violated was the right of pecuniary condition, to which the duty broken did not correspond. Had the person injured been the plaintiff's wife, in whose bodily security he had a potestative right, the damage to him would have been proximate. The expense to which he would have been put by performing the duty to take care of his wife, to which he would have been subject because of the marital relation, would have been consequential damage proximate to the violation of his potestative right in her. But his expense for the pauper was not necessarily remote because his duty was imposed by contract rather than by a marital relation. The question of its proximateness did not properly arise at all; that question was never reached, the other necessary elements of a tort not being present.

There are three, and only three, tests of proximateness, namely, intention, probability and the non-intervention of an independent cause.

Any intended consequence of an act is proximate. It would plainly be absurd that a person should be allowed to act with an intention to produce a certain consequence, and then when that very consequence in fact follows his act, to escape liability for it on the plea that it was not proximate.

Probability has the same meaning here as in connection with duties of probability, where the duty is to act or not to act in a way that will probably produce certain consequences. It is a name for some one's opinion or guess as to whether a consequence will result. In fact consequences follow causes according to invariable laws. To a sufficiently comprehensive intelligence everything would be certain, nothing merely probable. It is only because we have not knowledge of events, that are in themselves fixed and certain, that we have to consider probabilities.

The person whose opinion is taken is a reasonable and prudent man in the situation of the actor. The situation consists of such

facts as are known to the actor at the time of the act, including those facts of which he is charged with knowledge or deemed to have constructive knowledge. It would be unjust to require a person to act with reference to facts which were unknown to him or, when probability is the test of his liability, to hold him responsible for happenings which, with the use of proper attention, he could not foresee as probable. It follows that the probability of a consequence must be taken as at the time of the act. A probable consequence is one that to a reasonable and prudent man, having such knowledge as the actor had at the time of the act, would then have seemed probable. Of course, it is assumed that such a man gives proper consideration before acting to the possible consequences of his act. Probability is a matter of degree, ranging all the way from moral certainty to bare possibility. For legal purposes probability means a reasonable probability, or what amounts to the same thing in cases of tort, an unreasonably great probability, *i. e.*, such a probability as would deter a reasonable and prudent man in the actor's situation from doing the act. It has been laid down a hundred times that negligence, *i. e.*, conduct that amounts to the breach of a duty of probability, consists in doing something that a reasonable and prudent man in the actor's situation would not do. There are some consequences of conduct which in a given case, though they might be recognized as possible and therefore as having a certain degree of probability, are so unlikely to happen that a reasonable and prudent man would disregard them and not allow the chance of their happening to influence his conduct. We cannot go through life without continually taking some risks of injuring ourselves or others. All that the law requires is that we shall not take unreasonably great risks. Reasonable probability does not mean a preponderance of probability. In order that a consequence shall be legally probable, it is not necessary that it be more likely to happen than not.

In order that a consequence shall be probable it is not necessary that the precise consequence that actually happens in all its details should have been probable, nor that it should be connected with its cause by the precise chain of causation that was probable. It need only be of such a general character as might reasonably have been foreseen. The following examples will illustrate this. Owing to the negligence of a railroad company, it was probable that a cer-

tain train would be derailed somewhere on a certain stretch of track. A person rightfully on the track stepped off and stood by the side of the track to let the train pass. It happened to be derailed just at that point, and he was hurt. The injury was held to be probable,⁵ though the odds against the train's being derailed at that particular point and any one's being there at the time were thousands to one.

The defendant's carriage was negligently driven into the plaintiff's, and the plaintiff was hurt. The collision was a gentle one; and the defendant claimed that such an injury was not a probable consequence of a gentle collision. The consequence was held proximate; it was a probable consequence of a collision.⁶

The defendant set fire on his own land in such circumstances that it was negligent, *i. e.*, unreasonably dangerous, because of the probability that it would spread to the plaintiff's land. It did so spread, and damaged the plaintiff's property. The damage was held a probable consequence of the defendant's act, though the fire was communicated by sparks carried by the wind, a mode of communication that could not reasonably have been foreseen.⁷

If injury to a person or thing in a particular place or situation is probable, and it is probable that there will be some person or some thing in that situation, and a specific person or thing is injured, the injury will be probable, though it was very improbable that that particular person or thing would be there. If a person discharges a gun in the direction of a crowd of people, where he will probably hit some one, and hits John Doe, one of the crowd, the injury to John Doe is not improbable because the actor reasonably believed that John Doe was not there. If a township leaves a bridge without a guard rail, and a horse takes fright and backs off the edge, the injury is not improbable because it could not be foreseen that that specific horse would do so. It was probable that some horse would.⁸ There may, however, be some particular classes of persons or things, *e. g.*, trespassers or licensees, whose presence in a place is not probable.

There are many special rules as to the probability of certain kinds of consequences or of consequences which are connected with the cause in certain ways, which cannot be mentioned here. The fact

⁵ *Mobile, J. & K. C. R. R. Co. v. Hicks*, 91 Miss. 273, 46 So. 360 (1908).

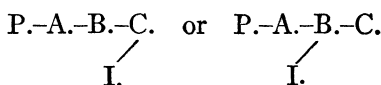
⁶ *Armour & Co. v. Kollmeyer*, 161 Fed. 78 (1908).

⁷ *Higgins v. Dewey*, 107 Mass. 494 (1871).

⁸ *Yoders v. Amwell*, 172 Pa. St. 447, 33 Atl. 1017 (1896).

that a consequence is partly due to the coöperating wrongful or negligent conduct of the person injured or of a third person may or may not make it improbable; such conduct may be a thing that should have been foreseen and allowed for.

The third test of proximateness is the non-intervention of an independent cause between the original cause and the consequence in question. When such a cause intervenes and thus makes the consequence remote, it may be considered to have the effect of legally isolating the principal cause, the cause whose proximateness is in question, from the consequence. Therefore it will be convenient to call it an isolating cause. Some special kinds of isolating causes will be mentioned in connection with the definitional consequences of peremptory duties a little further on. The question here is as to the ordinary meaning of an isolating cause. The principal cause seldom or never produces the consequence directly, but through a chain of intermediate causes, each of which is a consequence of the preceding one and a cause of the next. The principal cause, P., produces a consequence, A. A. produces B., and B., in turn, produces the consequence in question, C. This may be represented thus: P.-A.-B.-C. Intermediate causes, A. and B., are never isolating causes, because they are themselves consequences of P. All the authorities agree that an isolating cause must be an independent cause, *i. e.*, independent of the principal cause, not produced by it. This may be represented as follows:



It is plain, however, that the mere fact that a coöperating cause is an independent cause is not enough to make it an isolating cause, because there are always independent causes coöperating. No consequence that ever happens is the result of a single cause or the end of a single sequence of causation. It is always the meeting place of many such sequences.

An isolating cause must be an active efficient cause, the operation of some active agency, not merely some condition of things which makes it possible for the principal cause to produce the consequence.⁹

⁹ *Simmonds v. New York & N. E. R. R. Co.*, 52 Conn. 264 (1884); *Wallace v. Standard Oil Co.*, 66 Fed. 260 (1895); *Brown v. Chicago, M. & St. P. Ry. Co.*, 54 Wis. 342, 11 N. W. 356, 911 (1882).

At least that is the general rule, which, however, is perhaps subject to some exceptions.

It is said that an isolating cause must be a sufficient or superseding cause. This does not mean that it must be the cause of the consequence so as to exclude the operation of the principal cause, or that it must be sufficient in itself to produce the consequence without the principal cause or had the principal cause never existed. In that case the alleged principal cause would not be the cause of the consequence at all, and no question of proximateness could arise, as has been explained. I have not found or been able to deduce from the authorities any clear and exact definition of what a sufficient cause means. Perhaps it means one that, having in fact been set in operation and operating as it did, produced the consequence without any further active coöperation of the principal cause, the principal cause having merely had the effect of bringing the injured person or thing within the range of operation of the intervening cause. Sometimes the courts speak of the principal cause's having exhausted itself or ceased to operate. Perhaps, however, no precise rule can be laid down, and the question must be put in the general form; what in good sense and reasonableness must be considered the real effective cause? In other words, would it be on the whole just and reasonable to hold the actor responsible for a consequence of his conduct that would not have happened but for the intervention of such a cause? ¹⁰

It has been considered that the intervening cause must have been one whose intervention was improbable, so that the consequence was not a probable consequence of the principal cause. But the converse is not true; the fact that a consequence was improbable does not necessarily show that, when it has happened, it was due to some isolating cause.

It has been said that an intervening cause cannot be deemed to be an isolating cause, unless it is due to some one's volition,¹¹ or that when an injury is brought about by a complicated state of affairs, the last conscious agency must be taken as the proximate cause.¹² But it is believed that those statements go too far, that there may be an isolating cause not due to human volition or

¹⁰ *Merrill v. Los Angeles Gas & E. Co.*, 158 Cal. 499, 111 Pac. 534 (1910).

¹¹ *O'Brien v. American Bridge Co.*, 110 Minn. 364, 125 N. W. 1012 (1910).

¹² *Hartley v. Rochdale*, [1908] 2 K. B. 594.

agency, and that on the other hand the intervention of a conscious agency will not always and necessarily isolate a prior cause.

It must be admitted that the foregoing discussion of the nature of an isolating cause is very unsatisfactory. The matter has been involved in some confusion by the court's having sometimes failed to distinguish between cases where probability and where the absence of an isolating cause was to be taken as the test of proximateness, and applying to one case principles that were appropriate rather to the other. There is no doubt, however, that intention or probability is not always the test of proximateness, and that when it is not, the intervention of an independent active cause will sometimes make a consequence remote and sometimes will not, *i. e.*, that such a cause may or may not have the effect of an isolating cause, however hard it may be to find a precise rule or rules for deciding when it has such an effect. In some particular cases there are special rules that cannot be discussed here. The following examples may throw some light on the subject.

By the defendant's negligence gas escaped into a room. The plaintiff, not knowing of the danger and therefore being free from contributory negligence, went into the room with a light, and was hurt by an explosion of the gas. That was held a proximate consequence of the defendant's negligence; his act was not an isolating cause.¹³

A passenger was wrongfully put off of a railroad train at a distance from his station in a dangerous place. He started to walk to his station, and when he had nearly reached it, and had extricated himself from the danger, he turned and walked back through a tunnel, where he was run over by a train. That was held a remote consequence of the wrongful expulsion. His act was an isolating cause.¹⁴

The defendants' vessel by the negligence of the master and crew ran onto a shoal three-fourths of a mile from the plaintiff's sea wall. Because of a high wind and strong tide, her crew lost control of her, and she drifted onto the wall and damaged it. The defendants were held liable. The wind and tide were not isolating causes.¹⁵

¹³ *Dominion Natural Gas Co. v. Collins*, [1909] A. C. 640.

¹⁴ *Gwyn v. Cincinnati, N. O. & T. P. R. Co.*, 155 Fed. 88 (1907).

¹⁵ *Bailiffs of Romney Marsh v. Trinity House*, L. R. 5 Ex. 204 (1870).

The defendant wrongfully sold liquor to a man, which made him drunk. While drunk he killed his wife and then committed suicide. His son was allowed to recover against the defendant for causing the death of his parents. The man's act was not an isolating cause.¹⁶

The defendant sold to a child cartridges for a toy pistol, which was forbidden by statute. The child left the pistol with a cartridge in it lying on the floor of a room, and a second child in playing with it shot and killed the first child. That was held a proximate consequence of the act of selling.¹⁷

A railroad company carried a passenger, a young woman, to a wrong station and put her off there, where she had to wait for a train to take her to her station. While she was waiting, a man who got off at the station where she was committed rape upon her. That was held only a remote consequence of the company's wrongful conduct.¹⁸

The conductor of a freight train which ran on to a siding to let a passenger train pass on the main track ought to have closed the switch leading to the siding, but negligently omitted to do so. Therefore the passenger train ran onto the siding and ran into the freight train. The engineer of the passenger train, had he looked, would have seen that the switch was open. It was held that the negligence of the engineer, not that of the conductor, was the proximate cause of the collision.¹⁹

A fire insurance company, having a right to cancel a policy, sent a telegram to cancel it. By the negligence of the telegraph company the message was missent and did not reach the insured till after the building had been burned, for which loss the company became liable. It was held that the missending, not the fire, was the proximate cause of the loss to the company. Here the loss consisted in being subjected to a liability. The fire would not have caused that had the policy not been in existence. Therefore the fire, though an independent active cause, was not a sufficient cause.²⁰

In a case of tort the question of proximateness may arise as to the

¹⁶ *Neu v. McKechnie*, 95 N. Y. 632 (1884).

¹⁷ *Binford v. Johnston*, 82 Ind. 426 (1882).

¹⁸ *Sira v. Wabash R. R. Co.*, 115 Mo. 127, 21 S. W. 905 (1893).

¹⁹ *Louisville & N. R. Co. v. Wene*, 202 Fed. 887 (1913).

²⁰ *Providence W. Ins. Co. v. Western Union Tel. Co.*, 247 Ill. 84, 93 N. E. 134 (1910).

definitional consequences of the duty, as to the violation of right, or as to consequential damage. Different tests of proximateness may be applicable in different cases.

When the duty is peremptory, as has been explained, there is no breach of duty at all unless the definitional consequences actually happen, and intention or negligence is not necessary to a breach. It is plain that intention or probability cannot be the test of the proximateness of such consequences. To make that the test would practically amount to abolishing the class of peremptory duties.

It is still a disputed point whether intention or negligence is necessary to a trespass. Assuming that it is not, that the duty is really peremptory, all the authorities agree that inevitable accident will excuse the actor. The precise meaning of inevitable accident, when that expression is not used, as it sometimes is used, to denote the mere absence of intention or negligence, is hard to define. But whatever its precise meaning, it includes the intervention of an isolating cause. The test of proximateness here is, therefore, the non-intervention of an isolating cause — what will for convenience be hereafter called the isolation test. This is one of the cases mentioned above where the conception of an isolating cause is special. It is not clear that any intervening cause which would satisfy the general definition of an isolating cause would amount to inevitable accident.

The duty not to remove the support from land and cause it to fall is also a peremptory duty. If an excavation causes land to cave in, it makes no difference whether or not that consequence was intended or probable. But it must be proximate. It is believed that it will be proximate unless it is caused by the intervention of the act of God or *vis major*. Here, too, the test of proximateness is the isolation test, but the isolating cause is of a special character and must amount to the act of God or *vis major*. It is believed that what is said of this last mentioned duty applies to peremptory duties generally, *e. g.*, to the duty to prevent an actively dangerous thing which a person keeps in his possession, such as a vicious dog or an artificial collection of water, from doing harm, in places where such duties are really peremptory. In all the above mentioned cases of peremptory duties, it is quite possible to treat the cases where the party subject to the duty is excused from liability because the injury was due to inevitable accident, etc., as falling under exceptions to

the duty, and not as cases of remoteness at all. If so, then it must be said that all definitional consequences of peremptory duties are proximate, that no question of proximateness can arise as to such consequences. There are peremptory duties where even the act of God will not excuse, if the definitional consequences in fact happen, such as the duty of a person who is holding another's chattel *in mora* to protect it from injury or to restore it forthwith.

With duties of probability and intention, though, as has been said, there can be a breach of the duty without the definitional consequences actually happening, there can be no actionable wrong. To make a wrong the probable or intended consequences must actually be produced. If an act which is a breach of such a duty causes a violation of right which is not a definitional consequence of the duty or a consequence of such a consequence, there is not a sufficient correspondence between the duty and the right to make a wrong, irrespectively of any question of proximateness.

For instance, there is a duty of probability which, as defined, so to speak, *in genere*, is a duty not to do negligent, *i. e.*, unreasonably dangerous, acts. As so described, it corresponds to rights of bodily security and is owed to all persons. But if A. is shooting with a rifle at a target, and B. is standing close to the target, so that there is an unreasonably great probability that he will be hit, but no one else is apparently in any place of exposure, that generic duty, when it becomes operative and specific in the particular case, takes the form of a duty not to shoot in that direction. It is owed *in specie* only to B. and corresponds *in specie* only to his right. If now C. is lying concealed in the long grass behind the target, where he will probably be hit, but A. does not know that, then although *in genere* the duty is owed to all persons and corresponds to all persons' rights, yet *in specie* the duty is not owed to C. and does not correspond to his rights. The definitional consequence of the duty as it actually exists *in specie* on that particular occasion, is injury to B., not to C. If A. shoots, and does not hit B., but does hit C., he is guilty of a breach of duty toward B. but not of a tort to him, but toward C. there is no breach of duty at all, because the duty did not correspond *in specie* to any right of his. The injury to him was not a definitional consequence of the duty not to shoot. Therefore, no question arises whether the injury to C. was a proximate consequence of A.'s act.

The definitional consequences of duties of probability being probable consequences, it follows that that same probability is the test of their proximate. The definitional consequences of such a duty, when they actually happen, are necessarily consequences that were probable and therefore proximate; and no other consequences are proximate to the act, except further consequences of those definitional consequences, the proximate of which will be discussed below.

To the principles just stated there is perhaps an exception. When a negligent act consists in setting in operation an active dangerous agent, and is a breach of duty because that agent will probably do harm of a certain kind to persons or things within the range of its activity, such harm to such persons or things being the definitional consequence of the duty *in specie*, it has been held that if the activity of the agent extends further than was probable, and causes injury of such a kind to a person or thing outside of the probable field of its activity, so that such injury was in fact improbable and not a definitional consequence of the duty in the particular case, such injury must nevertheless be treated as standing on the footing of a definitional consequence. The duty must be deemed to have corresponded to the right so violated, and the injury to be proximate to the act.

A railroad company negligently set fire to some dry hedge clippings on its own land. The fire ran five hundred yards across a stubble field to the plaintiff's house and burned it. A verdict for the plaintiff was sustained.²¹ Some of the judges thought that the injury to the house was probable. On that view the case presents no difficulty. One judge dissented on the ground that the injury was not probable. But several of the judges said that the company would be liable even though it was not probable that the fire would run so far, if the company had been negligent in starting the fire. The company, of course, had a right to set fire to the clippings, which were its own property, and might have done so intentionally. Negligence here must therefore have meant that the act was unreasonably dangerous because of the probability that the fire would spread to neighboring land. The duty not to set fire to the clippings, a duty of probability, was undoubtedly owed to the owners of all land

²¹ *Smith v. London & S. W. Ry. Co.*, L. R. 5 C. P. 98, 39 L. J. C. P. 68, L. R. 6 C. P. 14, 40 L. J. C. P. 21 (1870).

to which the fire would probably spread, and corresponded to their rights. Injury to them would undoubtedly have been proximate. But a recovery by the plaintiff, if the injury to him was not probable, could be supported only on the ground of an exception to the general rule such as is now under consideration. The language of the judges, however, suggests that they did not distinguish between the definitional consequences of the duty and further consequences of them, which further consequences some courts, as will presently be explained, have held to be proximate though not probable. A similar decision was made in a case where the defendant shot and wounded a dog, and the infuriated animal did damage outside of the probable area of his activity; and the court said explicitly that a person who sets a dangerous thing in action is liable even for improbable consequences.²²

When a building has been negligently set on fire and the fire has spread to neighboring buildings, some courts have held the damage to the latter remote on grounds of humanity, saying that to hold a negligent person liable for a whole conflagration would be to impose a too crushing liability.²³ Such decisions have no bearing on the general theory of proximate consequences. Other courts have refused to follow any such principle, and various distinctions have been drawn. On the whole the cases respecting the spread of fire must perhaps be regarded as *sui generis* affording little guidance for other kinds of cases.

In duties of intention all the definitional consequences of the duty are intended. Therefore, if any such consequences happen, they are proximate. The same rule applies here as to duties of probability, that to make a tort some definitional consequence of the duty must actually happen, and all further injurious consequences, to be proximate, must be consequences of that definitional consequence. Of course the same act, being done with an intention to injure one person and being therefore a breach of a duty of intention toward him, may be negligent as toward another person, and a breach of a duty of probability as to him. In that case if the latter person is in fact injured, the proximate consequences of the injury to him may depend upon probability, not upon intention.

²² *Isham v. Dow's Estate*, 70 Vt. 588, 41 Atl. 585 (1898).

²³ *Ryan v. New York Central R. R. Co.*, 35 N. Y. 210 (1866); *Pennsylvania R. R. Co. v. Kerr*, 62 Pa. St. 353 (1870).

If the definitional consequences of the duty broken, having become actual as aforesaid, are themselves such consequences as constitute the violation of right necessary to make a tort, which may be called violative consequences, of course the same tests of proximate apply to them in one aspect as in the other. If A. fires off a gun when that is a negligent act, *i. e.*, is unreasonably dangerous, because of the probability that he will hit B., and B. is hit, the hitting of B. is both the definitional consequence of the duty and the violative consequence. In either aspect it is proximate because it was probable.

But often the violative consequences are not identical with the definitional ones, but follow them as further consequences of the act. If so, in order that they may be proximate consequences of the act, it is necessary, and is sufficient, that they be actually and proximately consequences of the definitional consequences. In considering the proximate of such a violative consequence, the definitional consequence, which more directly produced it, is taken as its cause rather than the act which was its primal cause. The question is: assuming that the definitional consequence actually happens, is such a violative consequence proximate to it? It follows that, if in any case probability is to be taken as the test of the proximate of a violative consequence, the probability of the violative consequence following the definitional consequence is not to be compounded with the probability that the definitional consequence would follow the act. For example: If the probability of the definitional consequence following the act was $\frac{1}{2}$ and the probability of the violative consequence following the definitional one was also $\frac{1}{2}$, then the probability of the violative consequence being produced by the act was at the outset only $\frac{1}{2} \times \frac{1}{2}$, or $\frac{1}{4}$. But in estimating the probability of the violative consequence the definitional one should be taken as certain, *i. e.*, to be represented by unity, the true question being, will the definitional consequence, if it happens, produce the violative one. The probability of the violative consequence therefore should not be taken as $\frac{1}{4}$, but as $1 \times \frac{1}{2}$, or $\frac{1}{2}$. There is very little direct authority for the above rule against compounding probabilities. In fact, numerical calculations of probabilities are seldom made, and generally would not be worth much for practical purposes. However, there are cases where the principle of not compounding the probabilities of suc-

cessive or coöperating causes seems to have been approved. The courts sometimes say that the final consequence of a series, which is held proximate as being probable, was not probable at the outset, that is, would not have been probable if all the probabilities had been compounded, but is probable on the assumption that some intermediate consequence actually happens.²⁴

The question whether a violative consequence was proximate to a preceding definitional consequence which was its more immediate cause, arises in two classes of cases: (1) where the definitional consequence was itself defined relatively, by reference to the violative consequence, and (2) where the definitional consequence was defined absolutely, not by any such reference.

A definitional consequence of a duty may itself be defined as consisting in the existence of some condition of things that in its turn will or may produce a violative consequence, such a causal relation to a violative consequence being of the essence of its nature as a definitional consequence of the duty. This is often the case in duties respecting dangerous things. The mere existence of a dangerous thing may be the definitional consequence of the duty, so that if the dangerous thing be produced, there will be a breach of the duty even though it does no harm. But a dangerous thing means a thing that will probably do harm. The harm, which in case of a tort will be the violative consequence, is a consequence of the existence of the dangerous thing, and is that by reference to which the existence of the dangerous thing is defined as being the definitional consequence of the duty. Thus in a duty to keep a highway safe, the condition of the highway itself, and no more than that, is the definitional consequence of the duty. The duty is not properly defined as a duty not to cause harm to travellers by the highway being unsafe, but simply as a duty to keep it safe. If the highway is allowed to remain in an unsafe condition, the duty is broken. But the probability of harm to travellers, which would be a violation of the right to which the duty corresponds, is what makes a given condition of the highway an unsafe condition.

When the definitional consequence is defined relatively by reference to a probable violative consequence, the same principles apply between those two consequences as between the act and the defini-

²⁴ *Quigley v. Delaware & H. Canal Co.*, 142 Pa. St. 388, 21 Atl. 827 (1891).

tional consequence in a duty of probability. To make a tort, the violative consequence must actually happen, and in order to be proximate it must be probable. The test of proximateness here is probability. If, for instance, a traveller is hurt because of the dangerous condition of the highway, that injury must have been a probable consequence of the highway being in such a condition.

But a definitional consequence may be defined by reference not to its probable, but to its actual consequences, though such cases are rare. If, for instance, A. maintains some thing on his land which sends noxious gases onto B.'s land. The thing is a nuisance; and it is so even though the emission of such gases or their passing onto B.'s land was improbable, *i. e.*, if A. had taken such precautions as would probably prevent the emission of any gases. The duty in such a case, I think, should be defined as a duty not to maintain such a thing, not as a duty not to send gases onto B.'s land. The existence of the thing would be the definitional consequence of the duty, and the passing of the gases onto B.'s land the resultant violative consequence. But the thing would be defined as a thing that would produce such a result. In this case, I believe that the test of proximateness should be the same as for the definitional consequences of peremptory duties, not probability but isolation. If gases actually passed onto B.'s land and did damage there, I think that the damage should not be held remote because it was not probable. In fact, some courts have applied the test of isolation and some of probability.

The defendant bought from the plaintiff a narrow strip of land along a stream, and then built a dam on his own land below. He made an embankment on the strip to protect the plaintiff's land from being flooded, but the water percolated through it and made the plaintiff's land wet. The defendant was held liable, though he had built the embankment with due care and skill, *i. e.*, in such a manner that the percolation was not probable. The court said that the percolation was not due to the act of God, *i. e.*, there was no isolating cause, and was a proximate consequence of building the dam.²⁵ But where the defendants made a cesspool on their own land, from which filth percolated into the plaintiff's land, it was held that

²⁵ *Pixley v. Clark*, 35 N. Y. 520 (1866).

the defendants would not be liable unless that consequence was probable.²⁶

The definitional consequences of a duty may, however, be defined absolutely, not by reference to any further consequences which they in their turn will or may produce, though this is not common when the definitional consequences are not identical with the violative ones. A good example is the duty of a ship to show certain lights at night. No doubt the reason for such a requirement is that the probability of collisions will be thereby lessened. But the duty itself is not defined by any reference, direct or indirect, to such a probability. It is not a duty to show such lights as will make a collision improbable, as reasonable safety calls for, but a peremptory duty to show certain prescribed lights. The mere presence or absence of the lights is the definitional consequence of the duty, a definitional consequence which is defined absolutely. If now a collision happens for want of lights, that is a violative consequence. In this class of cases the test of the proximateness of the violative consequence may conceivably be either probability or isolation. There seems to be no prevailing reason for adopting either one in preference to the other. The nature of the original duty, it is submitted, is not a proper guide to follow. Whether the duty was peremptory not to produce the definitional consequence or was a duty merely to use due care not to produce it, *i. e.*, not to act so as probably to produce it, when it has been in fact produced the breach of duty is complete and finished. What happens afterwards, the violation of the right, is something quite distinct and separate. Nevertheless, it is possible that some courts, overlooking the distinction between the definitional and the violative consequences, have been guided by the analogy of the duty, and when the duty as to the definitional consequence was peremptory and did not depend upon probability, have considered that the violative consequence also need not be probable to be proximate, but when the duty was one of probability, so that the definitional consequence had to be probable, have thought that the violative consequence must also be so. When, although the definitional consequence was not defined by the probability of its causing the violation of the right, that probability was the reason for prescribing such a defi-

²⁶ *Beatrice Gas Co. v. Thomas*, 41 Neb. 662, 59 N. W. 925 (1894).

ditional consequence, for creating just that kind of a duty, that may perhaps be a ground for holding that the violation of right must be a probable consequence of the breach of the duty. On the other hand, when a person actually commits a breach of his duty, when he actually does something which the law, without reference to any further consequences of his conduct, forbade him to do, it may reasonably be considered that he acts at his peril, and there seems to be no good reason why, as a general rule, he should be excused from liability, if another is actually injured by his wrongful conduct, because he could not have foreseen that particular injury. Accordingly, in this class of cases, which, as I have said, are not common, some courts seem to have approved the test of probability and others that of isolation; sometimes both tests are mentioned, and sometimes probability is said to be the test when there was in fact a sufficient isolating cause.²⁷

When a violation of right has happened, so that there is a complete tort which will support an action for at least nominal damages, there may ensue, as has been said, further injurious consequences which may be recovered for in an action for the tort as consequential damage. The violative consequences are never defined by any reference to actual or probable consequential damage, but always absolutely. Therefore the relation between the violation of right and consequential damage is like that between definitional consequences which are defined absolutely and violative consequences which follow them, and what has been said about the latter relation applies here. The consequential damage must be proximate to the violation of right, and through that it will be proximate to the act. If probability is taken as the test of its proximate-ness, the probabilities must not be compounded, but the probability of the consequential damage must be reckoned on the assumption that the violation of right actually happens. The nature of the duty broken, whether that was a peremptory duty or a duty of probability or intention, is not necessarily or properly any guide to the test of proximate-ness that ought to be used; and the remark above made that a person who has done wrong may justly be held liable for damage that is not probable, applies with even more aptness here.

²⁷ *Jackson v. Adams*, 9 Mass. 484 (1813); *Cate v. Cate*, 50 N. H. 144 (1870); *Daly v. Milwaukee E. Ry. & L. Co.*, 119 Wis. 398, 96 N. W. 832 (1903).

All that can be said here is that some courts take probability as the test of the proximateness of consequential damage, while other courts apply the isolation test. The difference of opinion here is real, and not merely apparent or verbal, and is irreconcilable. A choice simply has to be made between the two possible tests. However, the general rule that intended consequences are proximate applies to violative consequences and to consequential damage.

In the foregoing very general discussion, some cases of minor importance have been passed by without notice, and even in the cases that have been mentioned a considerable number of special rules whose application sometimes modifies or masks the general principles discussed, have also been omitted.

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